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No. 92-1546

IN THE

Supreme Court of the United States

October Term, 1993

UNITED STATES OF AMERICA,

Petitioner,

vs.

JOHN O. IRVINE and
FIRST TRUST NATIONAL ASSOCIATION,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether a 1986 Regulation, that by its express terms governs only disclaimers of interests created in "*taxable* transfers" before 1977, applies to tax as a gift a disclaimer of a remainder interest in a trust created in 1917, fifteen years before enactment of the federal Gift Tax Act.

2. Whether the taxation of a disclaimer of a remainder interest in a trust created before enactment of the federal Gift Tax Act in 1932

(a) violates Congressional intent that the Act not be retroactively applied to change the established disclaimer rules for pre-Act property interests; or

(b) violates the Due Process Clause of the Fifth Amendment in that the time for an effective disclaimer by Mrs. Irvine and other taxpayers similarly situated expired before enactment of the Gift Tax Act.

3. In the alternative, if the 1986 Regulation applies

(a) whether Mrs. Irvine's Disclaimer was effective for federal gift tax purposes because her remainder interest was subject to significant contingencies in addition to survival, unlike the remainder interest at issue in *Jewett v. Commissioner*, 455 U.S. 305 (1982), was made shortly after the termination of the trust, and also was made in reliance on the then controlling law; or

(b) whether the decision in *Jewett* should be reconsidered and overruled.

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UNITED STATES OF AMERICA,

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JOHN O. IRVINE and
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Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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BRIEF OF RESPONDENTS

This is an action for refund of $7,530,706.90, plus statutory interest, in federal gift tax erroneously assessed against and collected from Sally O. Irvine.1/ It involves the effectiveness for federal gift tax purposes of Mrs. Irvine's written Disclaimer of a portion of a remainder interest in the Ordway Trust. The Trust was created by her grandfather Lucius Ordway in 1917, fifteen years before enactment of the federal Gift Tax Act on

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1/ Mrs. Irvine died in 1987, and Respondents John O. Irvine and First Trust National Association are co-representatives of her Estate, the successor-in-interest to her refund claim. Respondent First Trust National Association's list of parent companies pursuant to S. Ct. R. 29.1 was included in its Brief in Opposition at 3 n.2. It has no subsidiaries.

June 6, 1932. A disclaimer is a refusal to accept property *ab initio*, and a taxpayer's right to disclaim has always been recognized by Congress as a matter of general property law. Mrs. Irvine's Disclaimer was a valid, timely, and effective refusal to accept ownership of her interest under Minnesota law, the applicable property law. The district court and the Eighth Circuit ruled *en banc* that her disclaimer was also effective for federal gift tax purposes and did not constitute a transfer subject to tax.

The Government, seeking reversal, complains that Mrs. Irvine "waited 48 years" to disclaim, too long under the Government's interpretation of Treas. Reg. § 25.2511-1(c). But the Government fails to tell this Court it has conceded that, under its interpretation of the Regulation, Mrs. Irvine's time for making an effective disclaimer expired before the Gift Tax Act was even enacted. This interpretation is contrary to the plain language of the Regulation, which applies only to disclaimers of interests created in "taxable transfers" before 1977. Mrs. Irvine's interest was created in 1917 in an obviously nontaxable transfer. The Government's interpretation is also contrary to the explicit Congressional intent that the Gift Tax Act not be retroactively applied and that any disclaimer rules not be retroactively applied to existing interests. Finally, it is just plain unfair.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the statutes and regulations set forth by Petitioner, Br. 2,[2/] the following constitutional and statutory provisions are directly involved in the case:

1. The Due Process Clause of the Fifth Amendment to the U.S. Constitution, which provides that "[n]o person shall . . . be deprived of . . . property, without due process of law . . . ."

2. Section 501(b) of the Revenue Act of 1932, 47 Stat. 245 ("Gift Tax Act" or "Act"), which provides that "[t]he tax shall not apply to a transfer made on or before the date of the enactment of this Act [June 6, 1932]."

2/ "Br." refers to Petitioner's brief on the merits, "Pet." refers to the petition for writ of certiorari, "PA" refers to the appendix to the petition, "Br. Opp." refers to Respondents' brief in opposition, "JA" refers to the joint appendix, and "RA" refers to the appendix to this brief. "8th C. Br." refers to Petitioner's main brief in the court of appeals, "8th C. App." refers to Petitioner's appendix in the court of appeals, "8th C. S. App." refers to Respondents' supplemental appendix in the court of appeals, and "D. Ct. Br." refers to Petitioner's main brief filed in the district court in support of its motion for partial summary judgment. "Tape Oral Arg." refers to the taped oral argument before the *en banc* court of appeals on January 6, 1992, which is on file with the clerk of that court, and of which Respondents have prepared a transcription. For the Court's convenience, Respondents have lodged a copy of the tape with the Clerk of this Court.

STATEMENT OF THE CASE

A. History and Terms of the Trust

Mrs. Irvine was six years old when her grandfather, Lucius Ordway ("Lucius"), created the Ordway Trust ("Trust") in 1917. As the Government has acknowledged, Mrs. Irvine learned of her remainder interest "at least by the time she reached the then-prevailing age of majority." JA 68; D. Ct. Br. 4-5; 8th C. Br. 3. The then-prevailing age of majority for women in Minnesota was eighteen, which Mrs. Irvine reached in 1928. Minn. Stat. Rev. 1866, ch. LIX, § 2; *see Vlasak v. Vlasak*, 204 Minn. 331, 333, 283 N.W. 489, 490 (1939).3/

The Trust was to continue until the death of the survivor of Lucius's wife and five children. JA 33. Then, the Trust would terminate and the Trust principal would be distributed as follows:

> Upon the death of the survivor of my wife and children, and the termination of the aforesaid trust, said trustees shall pay over and transfer the trust fund in equal shares to each of my grand children per capita and not per sturpes [sic]. If any of my grand children shall then have died leaving issue, said children shall be entitled to equal portions of the share of said deceased grand child.

JA 33.

Mrs. Irvine's remainder interest in the Trust principal entitled her to a share of that principal only after the deaths of Lucius's wife and five children, only if she

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3/ In the lower courts, the parties had assumed that the age of majority was 21, which Mrs. Irvine reached in 1931. Therefore, there are several incorrect references in the lower court decisions and briefs to 1931, instead of 1928.

were alive at that time, and only if she were to accept the interest. PA 2a-3a. Her share of that principal would be equal to one divided by the number of Lucius's grandchildren living at the time of the Trust's termination plus the number of deceased grandchildren with issue then living. Her share thus changed each time a grandchild was born or died without issue and was uncertain until the Trust terminated.

B. Mrs. Irvine's Disclaimer

In June 1979, upon the death of the survivor of Lucius's wife and children, the Trust terminated. On that date, twelve of Lucius's grandchildren, including Mrs. Irvine, were living, one grandchild had died leaving issue, and another had died without issue. PA 3a, 52a. Mrs. Irvine then became finally ascertained as a remainder beneficiary of the Trust, and her remainder interest at that time first became indefeasibly fixed as a one-thirteenth interest in the Trust principal. Mrs. Irvine completely and unequivocally disclaimed a portion of that interest by the written Disclaimer filed shortly thereafter. PA 3a.

Minnesota law recognized, as it did throughout the Trust term, a beneficiary's right to refuse to accept ownership of a remainder interest in a trust by disclaimer. *See Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973) (interpreting Minnesota common law and statute), *overruled on other grounds, Jewett v. Commissioner*, 455 U.S. 305 (1982). The Government concedes that Mrs. Irvine's Disclaimer made shortly after Trust termination was a valid, timely, and effective refusal to accept ownership of the interest under Minnesota law. Br. 4. In the courts below, the Government also conceded, by stipulation and at argument, that Mrs. Irvine never accepted any part of her remainder interest. 8th C. Br. 4;

Tape Oral Arg.4/ As a result of the Disclaimer, Mrs. Irvine was treated under Minnesota law as if she had died before the Trust's termination, and her children became entitled to equal shares of the disclaimed interest in accordance with the terms of the Trust instrument. PA 4a.

C. The State of the Law at the Time of the Disclaimer

Since the enactment of the Gift Tax Act in 1932, Rev. Act of 1932, §§ 501-532, 47 Stat. 245-59, the established rule has been that a disclaimer valid under applicable property law would not be a transfer for federal gift tax purposes. This rule was established in *Brown v. Routzahn*, 63 F.2d 914 (6th Cir.) (accepting 1931 district court's determination, 58 F.2d 329 (N.D. Ohio 1931), that state law controls), *cert. denied*, 290 U.S. 641 (1933), and it was applied consistently for years in gift tax cases. *E.g.*, *Hardenbergh v. Commissioner*, 198 F.2d 63 (8th Cir.) (court followed *Brown* rule and held that a disclaimer by heirs of an intestate estate would be treated as a transfer of property for federal gift tax purposes because Minnesota law provides that, in cases of intestate succession, property vested immediately in heirs upon decedent's death and thus could not be disclaimed), *cert. denied*, 344 U.S. 836 (1952); *Maxwell v. Commissioner*, 17 T.C. 1589 (1952). The Treasury Department also accepted and consistently

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4/ Court: Is that covered by the stipulation?

Mr. Paup: We have agreed there was no acceptance as to the remainder interest.

[Michael L. Paup, appearing for the Government.]

applied the *Brown* rule. *See, e.g.*, JA 39 (GCM 27626 (Jan. 15, 1953)), RA 1 (GCM 24626 (1945)).5/

In 1958, the Treasury Department promulgated Treasury Regulation § 25.2511-1(c), interpreting the gift tax provisions enacted in the 1932 Gift Tax Act and reenacted in the 1954 Internal Revenue Code ("Code"). The Regulation provided:

> Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right completely and unqualifiedly to refuse to accept ownership of property transferred from a decedent . . . a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be . . . effective under the local law.

The 1958 Regulation was the first time the IRS enunciated requirements for an effective disclaimer for federal gift tax purposes.

Mrs. Irvine resided in Minnesota, in the Eighth Circuit, for her entire life. At the time of her Disclaimer in 1979, *Keinath*, a 1973 Eighth Circuit decision involving a Minnesota resident, was the only appellate court case that had interpreted the 1958 Regulation. *Keinath* involved a remainder interest in a trust created in 1944, which was disclaimed shortly after the trust terminated in 1963. *Keinath* was the first time the Government publicly

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5/ A GCM (General Counsel's Memorandum) states the position of the Service's Office of Chief Counsel. GCMs are widely circulated throughout the IRS as statements of IRS policy. *Taxation With Representation Fund v. Internal Revenue Service*, 646 F.2d 666, 669–71 (D.C. Cir. 1981).

took the position that the "reasonable time" referenced in the 1958 Regulation began to run at the time the remainder interest was created, rather than at the time the trust terminated. The Eighth Circuit rejected this position, holding that under both the 1958 Regulation and Minnesota law, the "reasonable time" began to run when the trust terminated. The 1963 disclaimer was thus timely. 480 F.2d at 64. The Government did not seek further review of *Keinath*, and its announced policy at the time of Mrs. Irvine's Disclaimer was that it would follow *Keinath* as to taxpayers residing in the Eighth Circuit.[6/] *See, e.g.*, TAM 7829008 (CCH) (Apr. 14, 1978).[7/] Mrs. Irvine's Disclaimer was clearly timely for federal gift tax purposes under the 1958 Regulation as interpreted in *Keinath*.

6/ In *Cottrell v. Commissioner*, 628 F.2d 1127 (8th Cir. 1980), considered by the *en banc* Eighth Circuit, the Government did not even ask the *en banc* court to overrule *Keinath*, and the Eighth Circuit reaffirmed *Keinath*. *Id.* at 1131. *Cottrell* involved the disclaimer of a remainder interest in a trust created in 1937. The disclaimer, made in 1970, was timely under state law and was also effective for federal gift tax purposes.

7/ A TAM (Technical Advice Memorandum) is a written statement of IRS policy issued by the IRS National Office in connection with examination of a taxpayer's return or consideration of a taxpayer's claim for refund or credit. Treas. Reg. § 301.6110-2(f); *Tax Analysts and Advocates v. Internal Revenue Service*, 505 F.2d 350, 352 (D.C. Cir. 1974).

D. The Government's Assessment of Tax

Nearly three years after Mrs. Irvine's Disclaimer, this Court decided *Jewett*, which involved a 1972 disclaimer of a fixed fifty percent remainder interest in a trust created in 1939. The *Jewett* majority held that the ambiguous 1958 Regulation required the taxpayer to disclaim his interest within a "reasonable time" of the 1939 transfer, not the event causing the trust to terminate (which had not yet occurred). 455 U.S. at 318. *Jewett* thus rejected *Keinath*'s interpretation of the 1958 Regulation in the context of the facts presented.

The IRS assessed the tax against Mrs. Irvine in 1982 immediately after the *Jewett* decision, apparently believing that *Jewett*'s interpretation of the 1958 Regulation controlled in Mrs. Irvine's case. 8th C. S. App. 2, 11. Mrs. Irvine immediately paid the asserted liability, then filed an administrative claim for refund of the erroneously assessed tax.

The Treasury Department in 1986 amended the 1958 Regulation, limiting its application to "taxable transfers creating an interest in the person disclaiming made before January 1, 1977." The Government seeks to apply the 1986 Regulation to Mrs. Irvine's Disclaimer, and acknowledges that the 1958 Regulation on which its assessment was based, and which was before this Court in *Jewett*, is inapplicable. Br. 21 n.8; Tape Oral Arg., *quoted at* Br. Opp. 8 n.8. Mrs. Irvine's interest was created in 1917, before there was any gift tax, but the Government nonetheless contends that that was in fact a "taxable transfer." The Government has conceded that Mrs. Irvine's time for making an effective disclaimer under the 1986 Regulation expired *before* enactment of the Gift Tax

Act in 1932.8/ In short, the Government admits that Mrs. Irvine had no time at all to make an effective disclaimer.

E. Action by the Lower Courts

Both the district court and the *en banc* Court of Appeals for the Eighth Circuit rejected the Government's harsh, retroactive application of the 1986 Regulation and concluded that Mrs. Irvine's Disclaimer was not a transfer for federal gift tax purposes. The district court held that disclaimers of pre-Act interests like Mrs. Irvine's are effective for federal gift tax purposes as long as they are

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8/ Court: When in your view must she have done the disclaiming to have been reasonable?
Mr. Paup: Well, the regulations don't establish a bright line.
Court: But what's the Government's position?
Mr. Paup: Our position is that it had to be within a reasonable time.
Court: As to what, Mr. Paup, as to what?
Mr. Paup: Within a reasonable time after knowledge of the existence of the initial transfer.
Court: And, prior to the passage of the gift tax?
Mr. Paup: Ah, in this case, certainly, since she knew about it, reached her majority in 1931.
Court: So, the Government's position is to have been effective it would have had to have been prior to first enactment, initial enactment of the tax.

• • •

Mr. Paup: That's correct, your honor.

Tape Oral Arg. The Government's concession that the 1986 Regulation required Mrs. Irvine to disclaim before enactment of the Gift Tax Act reflects the current IRS position that a disclaimer of any interest created before 1977 will be timely only if made within nine months after the disclaimant reaches the age of majority. PLR 9308007 (CCH) (Nov. 24, 1992). A "PLR" (private letter ruling) is a statement of IRS policy. *Tax Analysts and Advocates v. Internal Revenue Service*, 505 F.2d 350, 353 (D.C. Cir. 1974).

valid under applicable property law, and rejected the Government's interpretation of the 1986 Regulation as contrary to Congressional intent that the gift tax statute not be retroactively applied. PA 56a-58a. Although an Eighth Circuit panel initially reversed the district court's opinion, the Eighth Circuit sitting *en banc* on rehearing found that the plain language of the 1986 Regulation, limiting its application to disclaimers of interests created in pre-1977 "taxable transfers," was dispositive, particularly in light of the Congressional prohibition against retroactive application of the Gift Tax Act. PA 7a. Because the 1986 Regulation did not apply, the *en banc* Eighth Circuit held that, based upon *Jewett* and *Hardenbergh*, the effectiveness of Mrs. Irvine's Disclaimer for federal gift tax purposes is determined by looking to state law. PA 10a-11a. Under Minnesota law, her Disclaimer was valid, and thus it was effective for federal gift tax purposes.

SUMMARY OF ARGUMENT

The Government seeks to apply the 1986 Regulation to tax Mrs. Irvine's Disclaimer of her remainder interest created in 1917, fifteen years before enactment of the Gift Tax Act. Under the 1986 Regulation, which by its terms applies only to disclaimers of interests created in "taxable transfers" before 1977, the Government concedes that Mrs. Irvine's time for disclaimer expired before enactment of the gift tax. The Eighth Circuit correctly held *en banc* that the plain language of the 1986 Regulation forbids the Government's harsh, untenable construction. Mrs. Irvine's interest was created before enactment of the Gift Tax Act, in an obviously nontaxable transfer, and therefore the 1986 Regulation plainly does not apply. Because the 1986 Regulation does not apply, the effectiveness of Mrs.

Irvine's Disclaimer for federal gift tax purposes must be determined under the *Brown* rule, the gift tax disclaimer rule that applies to cases not governed by the Regulation.

Application of the 1986 Regulation to Mrs. Irvine, to apply a new disclaimer rule to an interest created before enactment of the Act, also violates Congressional intent. Congress has always recognized that an effective disclaimer is not a transfer taxable as a gift. Congress has also explicitly directed that the provisions of the Gift Tax Act are not to be retroactively applied. The Government's application of the 1986 Regulation to pre-Act interests violates Congressional intent in both these respects. It is also fundamentally at odds with Congress's consistent practice in making each new effective disclaimer rule applicable only to interests created after enactment of the new rule. Under this consistent scheme, Mrs. Irvine's Disclaimer, valid under Minnesota law, was effective for federal gift tax purposes, because the property law rule was the disclaimer rule in effect at the time her interest was created.

The Government's retroactive application to impose a time period for disclaiming that expires before enactment of the Act also violates the Due Process Clause because, without notice, Mrs. Irvine and others in a small class of taxpayers whose interests were created in pre-Act transfers and whose time for disclaimer ran before enactment of the Act, are treated differently, and much more harshly, than all other taxpayers. Mrs. Irvine and those in her class are precluded from making an effective disclaimer, while all others have notice of the Gift Tax Act and an opportunity to make an effective disclaimer. There is no conceivable legitimate basis for this arbitrary, different treatment and the Government has offered none.

The Government treats this case as a replay of *Jewett*, but *Jewett* involved decidedly distinct facts. Moreover, *Jewett* addressed only a "narrow question" of

interpretation of the ambiguous 1958 Regulation as applied to a disclaimer of an interest created well after enactment of the federal gift tax. At issue here is the plain language of the 1986 Regulation. Also, the Government's attempt to apply the 1986 Regulation to pre-Act interests raises statutory and constitutional issues that were not before the Court in *Jewett*.

Even if the 1986 Regulation could apply to Mrs. Irvine, this Court should hold that Mrs. Irvine's Disclaimer was timely and effective for federal gift tax purposes. First, the "transfer" referred to in the 1986 Regulation in cases like hers should mean the 1979 Trust termination, rather than the 1917 creation of her interest. Significant contingencies were present affecting the size of Mrs. Irvine's remainder interest until termination, in addition to the survival contingency considered by the Court in *Jewett*. Three federal circuit courts have confined *Jewett* to its facts and held post-*Jewett* that an additional contingency renders effective a disclaimer made after the contingency event occurs, even though long after creation of the interest. Second, unlike Jewett, Mrs. Irvine had a pre-existing right to disclaim her interest and disclaimed in reliance on *Keinath*, the controlling law that the IRS had announced it would follow in her circuit. The Government's application of the 1986 Regulation to Mrs. Irvine to preclude her from making an effective disclaimer under these circumstances is fundamentally unfair.

Finally, this Court's belief in *Jewett*, based on a statement made by counsel for the Commissioner during oral argument, that the Commissioner had consistently interpreted the Code and the ambiguous 1958 Regulation regarding disclaimers was integral to its decision to uphold the Commissioner's interpretation. In fact, the Commissioner has not consistently applied the Regulation. The Commissioner's position adopted by the *Jewett* majority was newly developed in the late 1960s for

litigation, well after the fact. Documents recently discovered and not before the Court in *Jewett* demonstrate that the 1958 Regulation was intended to "codify" the *Brown* rule that the Treasury Department had applied for years in federal gift tax cases. Because the majority's interpretation of the 1958 Regulation in *Jewett* was based upon erroneous information, *Jewett* should be reconsidered in light of these new facts and overruled.

ARGUMENT

A. The 1986 Regulation Does Not Apply To Interests Created Before Enactment of the Federal Gift Tax, and Thus a Disclaimer of a Pre-Act Interest is Effective for Tax Purposes if Valid under State Law.

By its express language, the 1986 Regulation applies only to disclaimers of interests created in "taxable transfers" before 1977.2/ Mrs. Irvine's interest was created in 1917, fifteen years before enactment of the Gift Tax Act, in an obviously nontaxable transfer. The Government has acknowledged that Mrs. Irvine's time for making an effective disclaimer under the 1986 Regulation expired before enactment of the federal gift tax, before she ever could have known that a disclaimer not yet required under state law nevertheless would be untimely, and thus taxable, under a federal tax statute not yet enacted. The *en banc* court of appeals, based upon the plain language of

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2/ In *Jewett*, this Court dealt with a "narrow question" of interpretation of the ambiguous 1958 Regulation, as applied to an interest created after the Gift Tax Act was enacted. 455 U.S. at 306. *Jewett* did not decide the issue presented here – interpretation of the plain language of the 1986 Regulation. In *Jewett*, the 1939 transfer creating an interest in the person disclaiming was clearly a "taxable transfer."

the 1986 Regulation, rejected the Government's untenable construction. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) (interpretations should "avoid untenable distinctions and unreasonable results whenever possible"). Its holding was correct and should be affirmed.

It is fundamental that for a transfer to be "taxable" there must be an applicable tax in existence when the transfer is made. *See* PA 7a. Congress explicitly directed in 1932 that the federal gift tax "shall not apply to a transfer made on or before the date of enactment of this Act [June 6, 1932]," Act § 501(b), and continued that prohibition in all revisions of the Act to the present. *See* I.R.C. § 2502(b) (current version).10/ In light of that "consistently expressed intent," the *en banc* court rejected the Government's view that "the term 'taxable transfer' in [the 1986 Regulation] can refer to a transfer made before the enactment of the gift tax." PA 10a. The court reasoned that "[l]ogic, history, the expressed intent of Congress, and a straightforward reading of the regulations all join here to compel the opposite conclusion." PA 10a (footnote omitted).

The Government misleadingly implies that there is language in a different paragraph of the 1986 Regulation cited by the Government, in § 25.2511-1(c)(1), to support its view that "taxable transfers" include nontaxable, pre-Act transfers. In its brief, immediately after identifying and quoting from the Regulation, the Government states:

10/ Section 501(b)'s prohibition has constitutional underpinnings. In *Untermeyer v. Anderson*, 276 U.S. 440 (1928), this Court struck down the original 1924 gift tax on the ground it violated due process because it attempted to tax transfers completed prior to its enactment, and that statute was repealed in 1926. *See also Blodgett v. Holden*, 275 U.S. 142 (1927) (four justices holding 1924 gift tax unconstitutional, while others finding for taxpayer on statutory grounds). *Nichols v. Coolidge*, 274 U.S. 531 (1927), cited by the Government, Br. 16 n.5, did not involve any question regarding the 1924 gift tax.

> Under this express regulatory definition, the irrevocable transfer in trust made by Mrs. Irvine's grandfather in 1917 constitutes a "taxable transfer" for purposes of the disclaimer regulation even though that transfer "was not subject to the gift tax" (26 C.F.R. 25.2511-1(c)(1)).

Br. 26 (footnote omitted). But that paragraph of the 1986 Regulation cited by the Government, which is quoted in full at PA 61a-62a, contains no such language; it merely restates the general statutory requirements for imposition of the gift tax, applicable only to transfers after June 6, 1932. *See* Act § 501; current Code §§ 2501 and 2511. The 1986 Regulation provides no support at all for the Government's interpretation of "taxable transfers."11/

The Government virtually conceded in this case, during oral argument in mid-1989 in the district court, that the "taxable transfers" language renders the 1986 Regulation plainly inapplicable. It candidly informed the court that the Treasury Department intended to change that language:

> It's poor draftsmanship, there is no doubt about that, and the Service has informed me they will be issuing in the next 90 days or so clarification on this point.

11/ The Government also baldly asserts that the Commissioner has consistently interpreted the "taxable transfers" language in the 1986 Regulation, and then, relying on *Jewett*, states that this consistency entitles the Commissioner's interpretation to respect. Br. 27. But the Commissioner has not consistently applied either the 1986 Regulation or its predecessor the 1958 Regulation. *See infra* at 34-35 (discussing joint tenancy cases and 1966 letter ruling in which time for disclaimer did not run from "completed gift" but occurrence of subsequent contingency event).

8th C. App. 40 (transcript of oral argument in district court). Despite its representation to the court, the Government never made the change and ultimately terminated the amendment project. *See* IRS Notice 92-12, 1992-1 C.B. 500, 501.

Because the plain language of the 1986 Regulation is of no help to the Government, the Government seeks to justify its interpretation by relying on a definition of "taxable transfer" found in a *different* regulation promulgated to interpret a *different* Code provision, Br. 24-26, and by citing the Eleventh Circuit case involving a disclaimer made by Mrs. Irvine's brother, *Ordway v. United States*, 908 F.2d 890 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991). *Ordway* was wrongly decided, in part because the court there incorrectly relied upon Section 2518 of the Code and Treas. Reg. § 25.2518-2(c)(3).12/ Section 2518 and its implementing regulation established a new disclaimer rule that requires disclaimers of interests created after 1976 to be made within nine months after the "transfer" creating the interest. Pub. L. 94-455, §§ 2009(b)(1), 2009(e)(2), 90 Stat. 1893. A "taxable transfer" in Treas. Reg. § 25.2518–2(c)(3) is defined -- solely for purposes of the nine-month rule -- as one that "occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the

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12/ The Eleventh Circuit also totally overlooked the statutory and constitutional issues presented in *Ordway*. Those issues, however, were fundamentally different from the statutory and constitutional issues in this case, *see infra* at 20-33, because Ordway, much younger than his sister Mrs. Irvine, did not learn of his interest until 1941 and did not reach the age of majority until 1943. *Ordway*, 908 F.2d at 891-92. Under the 1986 Regulation, Ordway's time for disclaimer did not begin to run until well after enactment of the Gift Tax Act, while Mrs. Irvine's time for disclaimer expired before the Act.

completed gift."[13] This definition of "taxable transfer" cannot encompass interests created before enactment of the federal gift tax, because Section 2518 and its implementing regulation explicitly apply *only* to interests created after 1976. It clearly is inapplicable to Mrs. Irvine's Disclaimer. *See* PA 8a. ("[R]eliance on a single sentence from a regulation explicating a section of the Code [Section 2518] that is plainly inapplicable to this situation is inappropriate and misplaced.") (footnote omitted).[14]

The Government distorts the legislative history of Section 2518 to suggest that Congress required the Treasury Department to include "taxable transfers" in the 1986 Regulation to "coordinate with" the effective date of Section 2518. *See* Br. 24-26 n.12. In support, the Government misquotes the post-enactment explanation of Section 2518 prepared by the Staff of the Joint Committee on Taxation:

> [f]or purposes of this [statute], a transfer is considered to be made when it is treated as a taxable transfer, i.e., a completed transfer for gift tax purposes with respect to inter vivos transfers or upon the date of the decedent's death with respect to testamentary transfers.

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[13] In that context, Treas. Reg. § 25.2518-2(c)(3) provides that a "taxable transfer" can trigger Section 2518's nine-month time period even if the transfer is not taxed because of the $10,000 annual exclusion or other exemptions, deductions, or credits under the federal gift tax statute. *E.g.*, I.R.C. § 2523 (deduction for gifts to spouse).

[14] Even if it did apply, however, Treas. Reg. § 25.2518-2(c)(3) supports Respondents, not the Government, because it requires a "completed gift for Federal gift tax purposes." The *en banc* court below rightly expressed "difficulty in understanding how there can be, in the language of section 25.2518-2(c)(3), 'a completed gift for Federal gift tax purposes,' unless a federal gift tax is in force when the gift is made." PA 8a-9a.

Br. 25 n.12 (quotations omitted). The Government's selection of the bracketed word "statute" inaccurately suggests a much broader Congressional intent than the Joint Committee staff described. Rather than "statute," the staff used the word "requirement," and was referring directly to Section 2518's nine-month rule, which applies only to post-1976 interests. *See* Staff of the Joint Committee on Taxation, 94th Cong., 2d Sess., *General Explanation of the Tax Reform Act of 1976*, at 591 (Jt. Comm. Print, 1976), *reprinted in* 1976-3 C.B. 1, 603. If the Treasury Department wanted to "coordinate," it only needed to have said that the 1958 Regulation would apply to any disclaimers not governed by Section 2518. By adding the "taxable transfers" language, the Department went far beyond what was needed to coordinate effective dates.

The Government's interpretation of the 1986 Regulation is contrary to the plain language of the Regulation.15/ Mrs. Irvine's interest was not created in a "taxable transfer" before 1977. It was created in 1917, before there was a federal gift tax statute, in an obviously nontaxable transfer. As such, the 1986 Regulation is plainly inapplicable to Mrs. Irvine's Disclaimer. Because the 1986 Regulation does not apply, the effectiveness of Mrs. Irvine's Disclaimer for federal gift tax purposes must be determined under the *Brown* rule, the gift tax disclaimer rule that applies to cases not governed by the Regulation. *See Jewett*, 455 U.S. at 315-16; *Hardenbergh*, 198 F.2d at 66. Under that rule, her Disclaimer was valid

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15/ The government's position in the Eighth Circuit rested squarely on the "taxable transfers" language in the 1986 Regulation:

Court: Okay, so you've got to win with the definition of taxable transfer?

Mr. Paup: Yes, sir, and I think we can and should win with the definition of taxable transfer.

Tape Oral Arg.

under Minnesota law and thus is not a transfer subject to the federal gift tax.

B. Application of the 1986 Regulation to Pre-Act Interests Would Violate Congressional Intent and the Due Process Clause.

If the Court finds that the "taxable transfers" language does not limit application to post-Act interests, Respondents submit that application of the 1986 Regulation of the 1986 Regulation to pre-Act interests nevertheless violates Congressional intent and the Due Process Clause. The Government has conceded that under its interpretation of the 1986 Regulation, Mrs. Irvine never could have made a disclaimer effective for federal gift tax purposes. Congress, however, has always intended that an effective refusal to accept property, by means of a disclaimer, not be treated as a "transfer" of property by gift. Congress also has consistently and explicitly stated its intent that the Act must not be retroactively applied. Thus, even if its terms permitted it, application of the 1986 Regulation to pre-Act interests and, in particular, to preclude Mrs. Irvine from ever making an effective disclaimer would be contrary to Congressional intent in both these respects and, therefore, invalid under the Code.[16/] It also would violate the Due Process Clause.

16/ The district court based its summary judgment for Respondents primarily on this ground. PA 56a-58a. The *en banc* court of appeals, satisfied that the 1986 Regulation by its express terms did not apply to Mrs. Irvine's Disclaimer, did not reach this overriding issue of Congressional intent. *Jewett* did not involve the overriding statutory and constitutional issues presented in this case, because Jewett's interest was created in 1939, well after enactment of the Gift Tax Act.

1. **Congress Has Consistently Provided that Effective Disclaimers Are Not Transfers Subject to Federal Gift Tax.**

Section 501(a) of the Gift Tax Act enacted in 1932 imposed a tax on the "transfer . . . of property by gift." The Act further provided that "[t]he tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible." Act § 501(b).12/ The words "transfer," "property," and "gift" have their source in property law. As a fundamental precept of property law, a transfer is not complete until accepted, and a person cannot be forced to accept property. The right to refuse to accept a gift, by means of a disclaimer, is universally recognized under general property law, and an effective disclaimer is not a "transfer" by the disclaimant. *See Brown*, 63 F.2d at 917.

Since 1932, Congress has explicitly and repeatedly recognized that taxpayers, by disclaimer, can effectively refuse to accept gifts without such refusals constituting "transfers" subject to federal gift tax. In 1948, when Congress enacted the estate tax marital deduction and prescribed the effect of an estate beneficiary's disclaimer on the amount of property qualifying for the deduction, Rev. Act of 1948, § 361(a), 62 Stat. 117, 121, Congress recognized that a disclaimant would not be considered to have made a transfer subject to gift tax. The Senate Finance Committee reporting the bill explained:

> The gift tax amendments providing for a marital deduction do not contain any provision corresponding to the disclaimer

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12/ These provisions were reenacted in the 1939 and 1954 Codes, with no significant changes, and are contained in Sections 2501 and 2511 of the current Code.

> provisions under the estate tax marital deduction . . . . *Such provisions are unnecessary under the gift tax for the reason that if any person disclaims or refuses an attempted gift a transfer by gift is not considered made.*

S. Rep. No. 1013, 80th Cong., 2d Sess. 32 (1948), *reprinted in* 1948 U.S. Code Cong. & Ad. Serv. 1163, 1255 (emphasis added).

Congress explicitly recognized that an effective disclaimer does not constitute a transfer subject to gift tax in the Powers of Appointment Act of 1951, Ch. 165, § 3(a), 65 Stat. 93 (the "1951 Act"). In the 1951 Act, Congress implemented amendments to the gift tax first introduced in the Revenue Act of 1942, Title IV, § 452(c), 56 Stat. 952 (the "1942 Act"), extending the reach of the statute to tax the exercise and release of general powers of appointment.[18/] In the 1951 Act, Congress specifically provided that a disclaimer of a general power, which is a refusal to accept property *ab initio*, is not a taxable release of the power.

18/ A power of appointment is a power conferred by one person on another to select and nominate the person or persons who are to receive and enjoy property. Black's Law Dictionary at 1054 (5th ed. 1979). A general power is a power that the holder can exercise in favor of himself or herself or his or her estate or creditors. I.R.C. § 2514(c). A release is a relinquishment of the ability to exercise a general power. Before the 1942 Act, neither the release, nor even the exercise, of a general power was a "transfer of property" within the scope of the Gift Tax Act. *See Commissioner v. Walston*, 168 F.2d 211 (4th Cir. 1948) (invalidating regulation subjecting the exercise of general power to gift tax in a case arising in 1938, because the exercise of a power by the donee of a power is not a "transfer of property" by the donee); *Commissioner v. Solomon*, 124 F.2d 86, 89-90 (3d Cir. 1941) (release of power by donee not a "transfer of property" by donee).

Congress enacted Section 2518 of the Code, referred to above, in 1976, providing a rule for disclaimers of interests created after 1976. The House Ways and Means Committee report described existing law by noting that a disclaimer "recognized for Federal transfer tax purposes . . . is not treated as a taxable transfer by the person making the disclaimer." H. Rep. No. 1380, 94th Cong., 2d Sess. 65, *reprinted in* 1976 U.S. Code Cong. & Ad. News 3356, 3419.

The Treasury Department likewise, following Congressional intent, has consistently recognized that effective disclaimers are not "transfers" subject to tax. It is clear from available early Treasury Department policy statements that the Department followed the *Brown* rule for years in gift tax cases. For example, in 1945, the Service's Chief Counsel approved a proposed letter ruling that the renunciation of a life interest in a testamentary trust, made before receipt of any benefits of the interest, "will not constitute a gift" subject to federal gift tax. RA 1 (GCM 24626 (1945)). In a later GCM, the Chief Counsel explained the basis for this rule:

> The estate and gift tax provisions of the Code do not contemplate the taxing of testamentary gifts by renunciation. The right which the beneficiary holds is the right to accept such bequest or devise or the equal right to reject.

JA 39 (GCM 27626 (Jan. 15, 1953) (citing *Brown*)).[12/]

12/ Consistent with these policy statements, the early Treasury Regulations interpreting Sections 501(a) and (b) of the Gift Tax Act nowhere mentioned disclaimers or included any examples suggesting that a refusal to accept a gift was a "transfer . . . of property" by the disclaimant. Like the detailed examples contained in the Congressional committee reports accompanying the

Randolph E. Paul, author of the definitive treatise on early federal gift tax law, who had served in the early 1940s as a senior Treasury Department policy-making official, wrote in 1946:

> Despite the breadth of the gift tax statute, it obviously does not reach a refusal to accept property, which, in effect, shifts it back to the donor or elsewhere . . . .

Randolph E. Paul, *Federal Estate and Gift Taxation* § 16.03 at 686 (1946 Supp.) (and cases cited); *see also* Charles L. B. Lowndes & Robert Kramer, *Federal Estate and Gift Taxes*, 682-83 (1956) (according to leading commentators in 1950s, gift tax treatment of disclaimers followed property law). Subsequently, the Treasury Department issued the 1958 Regulation and then the 1986 Regulation, each recognizing that effective disclaimers are not "transfers" taxable as gifts under the gift tax statute.

The Government flagrantly distorts this Court's decision in *Jewett* and the lengthy history cited above in arguing that Congress intended that all disclaimers are "transfers" subject to the gift tax. According to the Government, the Treasury Department, through its 1958 and 1986 Regulations, created a "regulatory safe harbor"

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enactment of the Gift Tax Act (*see* H. Rep. No. 708, 72d Cong., 1st Sess., 27-28 (1932), *reprinted* in 1939-2 C.B. 457, S. Rep. No. 665, 72d Cong., 1st Sess., 39-40 (1932), *reprinted in* 1939-2 C.B. 496), each of the detailed examples in the early regulations involved a transfer of property *already owned by* the taxpayer. Treas. Reg. 79, Art. 2 (1933). Subsequent regulations interpreting Sections 501 (a) and (b) of the Act and its successor provisions in the 1939 Code, issued in 1936 and 1943, similarly made no mention of disclaimers.

from tax[20] that has no grounding in Congressional intent, and *Jewett* held that "a disclaimer indirectly effects a 'transfer of property by gift' (26 U.S.C. 2501(a)) and is therefore subject to the federal gift tax." Br. 15; *see also* Br. 12, 18, 22, 28, 29. *Jewett* did not hold this. Justice Stevens wrote for the majority in *Jewett* that a disclaimer "*may* constitute an indirect gift to a successor in interest subject to federal gift tax liability." 455 U.S. at 306 (emphasis added); *see also id.* (*Jewett* presented only a "narrow question" of interpretation of the 1958 Regulation). The Congressional history discussed above shows that disclaimers are not allowed merely by the grace of the Treasury Department, but that Congress has always intended that effective disclaimers not be treated as "transfers" subject to tax.[21]

Estate of Sanford v. Commissioner, 308 U.S. 39 (1939), and *Burnet v. Guggenheim*, 288 U.S. 280 (1933), cited by the Government, Br. 18, do not support the Government's contention that all disclaimers are taxable. Those cases each involved a transfer of property already owned by the taxpayer but subject to one or more powers retained by him to control its disposition. The issue for the Court in both cases was when the transfer became

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[20] The Government attempts to bolster this contention by its repeated characterization of Judge McMillian's "safe harbor" opinion in the court below, Br. 7, 8, but that is contradicted by the opinion itself, in which Judge McMillian never used those words.

[21] The Government ignores this history to support its litigating position here, but elsewhere recently it has acknowledged and affirmed it. For example, in its brief filed in *McDonald v. Commissioner*, 853 F.2d 1494 (8th Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989), the Government acknowledged that the ability effectively to refuse a gift is implicit in Section 2511 of the Code. 8th C. S. App. 6, 52. And in a recent official policy statement, the Government reiterated that effective disclaimers are not "transfers." *See* JA 75 (GCM 39858 (Sept. 9, 1991) (citing *Brown*)).

complete (and thus taxable), and the Court held that that occurred when the grantor relinquished the control he had retained. Neither case has any application to a donee's refusal to accept property, in which no control is relinquished because none has ever been acquired. *See Solomon*, 124 F.2d at 89-90 (holding that relinquishment of a power of appointment was not taxable as a gift and declining to apply *Sanford* because it was fundamental in *Sanford* that the "person with control over the property was either its owner or donor in the first instance"). Like *Estate of Sanford* and *Guggenheim*, the other cases cited by the Government, Br. 12, 15, 18, each involved a transfer of property already owned by the taxpayer.

Congress has clearly and consistently intended that a taxpayer, by disclaimer, can effectively refuse to accept a gift. The Government's interpretation of the Act and the 1986 Regulation to apply to disclaimers of pre-Act interests violates that clear and consistent intent.

2. Congress has Consistently and Repeatedly Directed that New Disclaimer Rules Are Not to be Retroactively Applied to Existing Interests.

Not only has Congress always recognized the right to disclaim, Congress has also consistently and repeatedly directed that the Act must not be retroactively applied and that new disclaimer rules are not to be retroactively applied to existing interests. The Government's interpretation of the 1986 Regulation to apply to interests created before enactment of the Act would be a retroactive application of the Act clearly contrary to Congressional intent.

Congress provided in the original Act that "[t]he tax shall not apply to a transfer made on or before the date of the enactment of this Act [June 6, 1932]." Act § 501(b). Congress adhered to this prohibition against retroactive

application of the Act in its multiple subsequent amendments to the Act, "avoid[ing] any taint of retroactivity in connection with the [gift tax]. . . ." Charles L. B. Lowndes, Robert Kramer, & John H. McCord, *Federal Estate and Gift Taxes* 643 (3d ed. 1974). Most significant here, each time that Congress has amended the gift tax statute to establish a new disclaimer rule, it has followed Section 501(b)'s mandate by applying each new rule only prospectively, to disclaimers of interests created after enactment of the new rule. Congress has correspondingly required that existing disclaimer rules continue to apply to disclaimers of interests created before enactment of the new rule. This history establishes, consistent with Section 501(b), that the effectiveness of a disclaimer for federal gift tax purposes must be measured by the rule in effect when a disclaimant's interest was created.

In the 1951 Act, when implementing the 1942 Act amendments extending the gift tax to exercises and releases of general powers of appointment, Congress provided that a disclaimer of a general power would not be treated as a taxable release of the power, 65 Stat. 94, if the disclaimer satisfied applicable property law requirements and was made within a reasonable time after knowledge of existence of the power. S. Rep. No. 382, 82d Cong., 1st Sess. (1951), *reprinted in* 1951 U.S. Code Cong. & Ad. Serv. 1530, 1534. This was the first time that Congress ever prescribed a federal timeliness requirement, in connection with state law requirements, for an effective disclaimer. Significantly, Congress applied this federal timeliness requirement prospectively, only to disclaimers of powers created after October 21, 1942 ("post-1942 powers"), the date of first enactment of the new tax rule. Powers created before enactment of the new tax rule ("pre-1942 powers") could be released at any time free of gift tax, as long as the release satisfied property law requirements. *See* Treas. Reg. § 25.2514-(2)(d). A disclaimer of a pre-1942 power satisfying property law

requirements also is tax-free, because a disclaimer is a refusal to accept property *ab initio*.22/

In 1976, when Congress enacted the new disclaimer rule in Section 2518, requiring disclaimer nine months after the "transfer creating the interest in the person disclaiming," it provided that the new rule would apply only to disclaimers of interests created after 1976, after enactment of the new rule. Pub. L. 94-455, § 2009(e)(2), 90 Stat. 1893. Similarly, when Congress amended Section 2518 in 1981, the amendments applied only to disclaimers

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22/ Although the new disclaimer rule for post-1942 powers was not enacted until 1951, Congress had grandfathered in pre-1942 powers in the 1942 Act by providing that such powers could be released tax-free at any time before January 1, 1943, and it extended that date several times until finally enacting the 1951 Act. *See, e.g.*, ch. 120, § 10, 57 Stat. 150 (example of extension of time period for tax-free release). Post-1942 powers also could be released at any time between 1942 and 1951 under these grace period provisions. Thus, the holders of general powers had ample time between 1942 and 1951 to release the powers tax-free. The 1951 Act loosened rather than tightened the new tax rules enacted in the 1942 Act, so it was unnecessary for Congress to provide any additional grandfather protection in the 1951 Act for releases of powers created between 1942 and 1951.

The tax treatment of releases of general powers is of special significance, because the Government in its brief filed in *Jewett* argued that disclaimers should be taxed like releases of general powers, 8th C. S. App. 6, 55, and the Court recognized the propriety of the analogy. 455 U.S. at 318. A release, like a disclaimer, is a relinquishment of rights. Indeed, a release can occur under property law principles even after acceptance, while a disclaimer is a refusal to accept property *ab initio*. After enactment of the 1942 Act imposing a tax on exercise of general powers, releases of pre-1942 general powers made in accordance with property law requirements remained free of gift tax. Under the analogy recognized by the Court in *Jewett*, after enactment of the 1932 Gift Tax Act imposing a tax on "transfers of property," disclaimers of pre-1932 remainder interests made in accordance with state property law requirements must remain free of gift tax.

of interests created after 1981. Pub. L. 97-34, § 426(a), 95 Stat. 318.

This history manifests Congressional intent to protect the settled expectations of donees and donors of property, by permitting a disclaimer by the donee under the rules in place when the interest was created. Such protection was warranted because the new rules, in general, have added more stringent requirements, including more stringent timeliness requirements. Application of the new rules to existing interests would unfairly upset those settled expectations.

For that reason, in *Commissioner v. Estate of Copley*, 194 F.2d 364 (7th Cir. 1952), *aff'g* 15 T.C. 17 (1950), *acq.*, 1965–2 C.B. 4, the Seventh Circuit invoked Section 501(b) to invalidate a tax on post-Gift Tax Act transfers because a critical event had occurred *before* enactment of the Act that made application of the tax unfair. *Copley* involved a husband's transfers to his wife in 1936 and 1944 totalling $1,000,000, pursuant to a 1931 antenuptial agreement. The Act imposed the gift tax on transfers for inadequate consideration, and the Commissioner sought to tax the 1936 and 1944 transfers on this basis. The court held that because the rights of Copley and his wife were fixed before enactment of the Act, it would be an unfair retroactive application of the Act to tax Copley on his 1936 and 1944 transfers.[23/] *Id.* at 366-67. Taxation of

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23/ The Government suggests that *Estate of Copley* does not "parallel" the facts of this case, because *Copley* did not face an issue whether a "gratuitous transfer by the wife after 1932" would have been subject to gift tax. Br. 20 n. 7 (emphasis omitted). This suggestion begs the question, for the issue here is whether, like the *Copley* husband's transfer of assets in 1936 and 1944 pursuant to a 1931 agreement, Mrs. Irvine's Disclaimer was an effective disclaimer for federal gift tax purposes (and, thus, nontaxable and not a "gratuitous transfer") or an ineffective disclaimer (and, thus, a transfer of property by gift). *Copley* is persuasive because it illustrates a situation in which a federal circuit court held that

Mrs. Irvine's Disclaimer would similarly be an unfair retroactive application of the Act.

The Government in the district court conceded that its application of the 1986 Regulation to Mrs. Irvine was retroactive. D. Ct. Br. 17-18. The Government in the Eighth Circuit conceded that Mrs. Irvine had no opportunity to make an effective disclaimer. But here, the Government says that because her Disclaimer was made in 1979, there is no retroactive application of the tax, and the fact that her interest was created before the Act is irrelevant. Br. 18.24/ Aside from its mischaracterization of the *Jewett* holding, that is the Government's sole

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application of the Gift Tax Act was unfairly retroactive under Section 501(b), even though the asset transfers took place in 1936 and 1944.

24/ The *en banc* court of appeals did not suggest that taxing Mrs. Irvine's 1979 Disclaimer would "apply the tax retroactively," contrary to the Government's contention. *See* Br. 17 (quoting PA 7a). To make this contention, the Government misquotes from the part of the *en banc* court of appeals opinion holding that *Lucius's* transfer creating Mrs. Irvine's interest was not a "taxable transfer" within the meaning of the 1986 Regulation, because, in part, "Congress expressed its intention not to apply the tax retroactively." PA 7a.

The Government relies on *United States v. Jacobs*, 306 U.S. 363 (1939), and several other cases to suggest that because there is no retroactive application of the "tax," the retroactive application of a federal reasonable time period must not be contrary to Congressional intent, but that reliance is misplaced. *See* Br. 19. These cases all involved constitutional challenges to tax statutes, where Congress had clearly stated its intent that the statute must be applied in the manner in which it was applied by the Government. The resolution of these cases has no bearing on the question of Congressional intent at issue here. In *Reinecke v. Northern Trust Co.*, 278 U.S. 339 (1929), the Court held in favor of the taxpayer on another statutory issue in the case to avoid a construction of very doubtful constitutionality. *Id.* at 348-49.

response to the Respondents' argument based on Congressional intent. In *Estate of Copley*, 194 F.2d at 365, the Seventh Circuit rejected a similar argument made by the Commissioner ("the Commissioner in the question as posed, as well as in his brief, over-simplifies the situation"). By focusing solely on the 1979 Disclaimer, the Government ignores the retroactive application of the Act itself, a matter that it recognized in both courts below.

Congress has made its intent very clear that taxpayers have the right to disclaim property and that new disclaimer rules are not to be retroactively applied to existing interests. Under this consistent scheme, following Section 501(b)'s mandate, the effectiveness of Mrs. Irvine's Disclaimer must be measured by the disclaimer rule in effect when her interest was created, the applicable property law rule.

3. Taxation of Mrs. Irvine's Disclaimer Under the Government's Construction of the Gift Tax Act and The 1986 Regulation Would Violate Due Process.

Application of the 1986 Regulation to tax Mrs. Irvine's Disclaimer should also be rejected as a matter of statutory construction to avoid the resolution of a constitutional issue. The Government's retroactive application, without notice, would treat Mrs. Irvine, and a small number of other taxpayers whose interests were created in pre-Act transfers and whose time for disclaimer ran before enactment of the Act, differently, and much more harshly, than all other taxpayers, because they would be required to disclaim *before* enactment of the Gift Tax Act. Others whose time for disclaimer runs after enactment have notice of the Gift Tax Act and the opportunity to make an effective disclaimer. The Government's construction of the Gift Tax Act and the

1986 Regulation in this case would violate the Due Process Clause.

This Court's precedents establish the doubtful constitutionality of the Government's construction. First, a retroactive tax statute is judged under the following standard:

> [The court] must "consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." . . . One of the relevant circumstances is whether, without notice, a statute gives a different and more oppressive legal effect to conduct undertaken before enactment of the statute.

United States v. Hemme, 476 U.S. 558, 568-69 (1986) (quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938)); *see also Untermyer*, 276 U.S. at 445 (holding original 1924 gift tax unconstitutional). Retroactive application of a tax statute is accorded particular scrutiny when the statute imposes a wholly new tax, as did the Gift Tax Act in 1932. *See Hemme*, 476 U.S. at 568 (upholding amendment to established tax and distinguishing *Untermyer* which held new gift tax unconstitutional). Second, an arbitrary statute that lacks any rational basis also violates due process. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); *see also Heiner v. Donnan*, 285 U.S. 312, 331-32 (1932) (gift tax statute held unconstitutional where narrow class of taxpayers was subjected to much harsher treatment than others for no legitimate purpose). The Government has never attempted to articulate any rational basis for its arbitrary, retroactive application of

the gift tax statute in this case.25/ If the Government's construction of the Act and the 1986 Regulation were accepted, this Court would have to reach this significant due process issue. And if the Court does reach this issue, the Government's construction should be struck down as a violation of Mrs. Irvine's right to due process because she, without notice, would be taxed arbitrarily for no legitimate reason with regard to conduct undertaken years before enactment of the Gift Tax Act.

C. In the Alternative, if the 1986 Regulation Applies, This Court Should Hold that Mrs. Irvine's Disclaimer was Timely and Effective for Federal Gift Tax Purposes.

As a separate, alternative ground for affirmance, if the 1986 Regulation does apply, this Court should hold that Mrs. Irvine's Disclaimer, made within a reasonable time after termination of the Trust in 1979, was timely and effective for federal gift tax purposes. The *Jewett* majority held that the "transfer" referred to in the ambiguous 1958 Regulation meant the 1939 creation of Jewett's remainder interest, while the dissenting Justices interpreted "transfer" to mean the transfer that would occur upon trust termination. First, there are substantial reasons why "transfer" in this case should be construed to mean the 1979 Trust termination, rather than the 1917 creation of the Trust. Second, if the Court decides that *Jewett* is controlling in this case, that decision should be

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25/ Like its approach to the issue of Congressional intent, the Government dismisses any constitutional issue by focusing solely on the fact that Mrs. Irvine's Disclaimer occurred in 1979 and ignoring the retroactivity at issue. *See supra* at 30-31. None of the cases deciding constitutional questions cited by the Government, Br. 19, involved the Gift Tax Act, or retroactivity resulting in arbitrary, different treatment of similarly situated taxpayers.

reconsidered and overruled, because it was based upon erroneous information concerning the history of the 1958 Regulation and the Commissioner's interpretation of that Regulation.

1. The "Transfer" Referred to in the 1986 Regulation Should Be Construed to Mean the 1979 Trust Termination, Rather than the 1917 Creation of the Trust.

The *Jewett* majority, in determining that the "transfer" creating Jewett's interest in 1939 was the one from which to measure his time to disclaim, found it significant that the only contingency preventing Jewett from taking his fixed fifty percent share of trust principal was the requirement that he survive the life beneficiaries. *See* 455 U.S. at 318 (petitioner had "50-percent remainder interest of a trust" for twenty-four years) (*quoting* 70 T.C. at 438). By contrast, significant contingencies, in addition to survival, were present for Mrs. Irvine until Trust termination, because the number of remainder beneficiaries and the size of her interest changed considerably during the Trust term and were subject to change until Trust termination.[26/]

The Treasury Department itself, in 1966, held in a private letter ruling not before the Court in *Jewett* that the presence of a contingency in addition to a survival contingency renders effective a disclaimer made after the contingency event occurs, even though made long after

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26/ When the Trust was established in 1917, Lucius had five children aged thirteen to thirty-two and four grandchildren, including Mrs. Irvine, aged nine months to six years. The number of remainder beneficiaries grew from four to ten by 1925 , then to twelve by 1927 and fourteen by 1932. The class size decreased to thirteen by 1953 when the youngest grandchild of Lucius Ordway died without issue. JA 29.

the creation of the interest. In that private letter ruling the Commissioner allowed a taxpayer with knowledge at least since 1936 of an income interest in a trust created in 1933 to disclaim free of gift tax in 1966 when she became entitled to an additional income share. *See* JA 53 (PLR 6612201590A (Dec. 20, 1966)); *see also infra* at 42. The relevant "transfer" as the Service applied the 1958 Regulation in that ruling was the contingency event entitling the taxpayer to a greater income share, *not* the creation of her interest in 1933.

Since *Jewett*, three circuit courts of appeals, in cases involving the timeliness of a disclaimer of a survivorship interest in jointly held property, have confined *Jewett*'s definition of transfer to its facts. In these cases, the courts of appeals have held that because state property law permitted a joint tenant to sever the joint tenancy to strip the other of the survivorship interest, the relevant "transfer" for purposes of determining the timeliness of a disclaimer did not occur when the joint tenancy was created. Rather, it occurred upon the death of the husband in each case, when the contingency disappeared. Thus, disclaimer within a reasonable time after that death was timely. *See Estate of Dancy v. Commissioner*, 872 F.2d 84 (4th Cir. 1989); *McDonald v. Commissioner*, 853 F.2d 1494 (8th Cir. 1988) (lower court opinion at 89 T.C. 293, 295 n.7 indicates interest held more than thirty-four years before disclaimer), *cert. denied*, 490 U.S. 1005 (1989); *Kennedy v. Commissioner*, 804 F.2d 1332 (7th Cir. 1986) (interest held more than twenty-five years before disclaimer).[22/]

As in the 1966 letter ruling and the joint tenancy cases, important contingencies made it impossible for Mrs. Irvine to determine in the 1920s even what

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[22/] The Government gave up litigating joint tenancy disclaimer cases in 1990. 8th C. S. App. 39-40 (IRS Action on Decision CC-1990-06 (Feb. 7, 1990)).

fractional share of the Trust principal she might one day receive. Even in the joint tenancy cases, the surviving spouse knew exactly what she might one day inherit from her husband. The much more uncertain contingencies in Mrs. Irvine's case were not removed until the Trust terminated. Under these circumstances, unlike those present in *Jewett*, Mrs. Irvine's Disclaimer was timely and effective because it was made shortly after the event that caused the contingencies to disappear, the termination of the Trust.

As the dissenting Justices in *Jewett* recognized, even where only the survival contingency was present, the ambiguous 1958 Regulation, providing for a "reasonable time" and disclaimer only after "knowledge of the existence of the transfer," should be interpreted to permit disclaimer after trust termination. Justice Blackmun, writing for the dissenters, recognized the unfairness of requiring disclaimer long before the remainder interest rights ever become possessory. Because Jewett had to survive the life interest holders to ever be entitled to any share of the trust principal, the dissent recognized that "[i]t is the contingency event [of survival] that is important and makes sense in the consideration of any disclaimer." 455 U.S. at 323.[28] There

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[28] A disclaimer, the dissent noted, is "fundamentally different from a voluntary transfer of property," with which the gift tax statute is concerned. 455 U. S. at 323. A disclaimer is the exercise of a right to refuse to accept property, without exercising control or direction as to its transfer, "for that selection has been made by the trustor." *Id.* The majority referred to the disclaimant's "control" over property, *id.* at 318, but as the dissent correctly noted, a remainder beneficiary, like any disclaimant, exercises no control over property by refusing to accept it. The Government had suggested in its brief in *Jewett* this "control" existed by its misleading reliance, as in this case, on *Estate of Sanford* and *Guggenheim*, *see Jewett* Brief for the Respondent 26, cases which deal with the issue of the timing of a gift of property already owned by the donor, and are not apposite to a

is fundamental unfairness in requiring that disclaimer take place "long before the interest could ripen into enjoyment . . . at a time when the disclaimant does not know what he is disclaiming or whether he ever would receive and enjoy any interest." *Id.* at 328.29/ It is even more unfair to require Mrs. Irvine to disclaim in the 1920s, because she could not have known then the size of her ultimate share of the Trust principal.

The dissent relied upon the Eighth Circuit's sound analysis of the legal issue in *Keinath*. The Eighth Circuit there noted that "reasonable time" was not defined either in the Code or the 1958 Regulation. And the basic requirements of the 1958 Regulation, including the reasonable time requirement, "are but a codification of common law principles applicable to the doctrine of disclaimers," under which a remainder beneficiary has a reasonable time after the death of the life beneficiary within which to disclaim. *Id.* at 324 (*quoting Keinath*, 480 F.2d at 59). *Keinath* had remained the only appellate

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donee's refusal to accept property. *See supra* at 25-26.

29/ The majority had relied on the Tax Court's assertion in *Jewett* that "the passage of time is crucial to the scheme of the gift tax," 455 U.S. at 316 n.17 (*quoting* 70 T.C. at 437), for which the Tax Court, in turn, had cited no authority at all. As the dissent correctly pointed out, the Tax Court's conclusory analysis "rest[ed] on an insecure base," *id.* at 326, the 1961 decision in *Fuller v. Commissioner*, 37 T.C. 147 (1961). *Fuller* involved a disclaimant who had received the benefit of an income interest for twenty-five years before purportedly disclaiming part of that same income interest. Although the Government notes in this Court that Mrs. Irvine had received income from the Trust, Br. 3, 16 n.4, and 23, she had never accepted any portion of her remainder interest before executing her Disclaimer. The Government's own regulations recognize that, because the interests are entirely separate, receipt of trust income as a life interest holder has no effect on the ability to disclaim a remainder interest. Treas. Reg. §§ 25.2518-2(d)(1) and (4) (Ex. 1), 25.2518-3(a)(1).

court authority interpreting the 1958 Regulation for over seven years after 1973, and indeed was reaffirmed by the *en banc Cottrell* decision in 1980. *See* 455 U.S. at 323.[30] *See also* Jacob Mertens, *The Law of Federal Gift and Estate Taxation* § 34.14, at 565-66 (Interim Supp. 1974) ("reasonable time" for disclaimer of a remainder interest is governed by applicable property law and runs from death of life beneficiary, relying on *Keinath*). Congress, too, when it enacted Section 2518 of the Code, acknowledged and indicated satisfaction with *Keinath* by establishing a new effective disclaimer rule that would only apply for disclaimers of interests created in the future. Pub. L. 94-455, § 2009(e)(2), 90 Stat. 1893; H. Rep. No. 1380, 67-68, *reprinted in* 1976 U.S. Code. Cong. & Ad. News 3356, 3420 & n.4 (acknowledging *Keinath*). The dissent found unfairness in departing in *Jewett* from *Keinath*'s settled interpretation of the 1958 Regulation, on which taxpayers and their advisors had properly relied.

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[30] Indeed, *Keinath* lent stability to an area that the IRS, in 1964, recognized had caused difficulty and uncertainty for taxpayers because of the ambiguous 1958 Regulation :

> [I]t would seem that inasmuch as the Service has interjected an uncertainty it should not close its eyes to the problem. It is reasonable to assume that a person might truly prefer not to receive property from a decedent's estate, but would not disclaim if he knew that such disclaimer would cost him money out of his own pocket (by gift tax). Accordingly, the taxpayer should be entitled to know what position the Service is going to take on a given set of facts and circumstances. Otherwise, he is compelled to proceed in something of a blind fashion, not being able to determine the tax consequences primarily by reason of the fact that a state of irresolution has been wrought upon him by the Service.

GCM 32894 (Aug. 10, 1964), which did not become publicly available until the early 1980s. For the Court's convenience, Respondents have lodged a copy of this GCM with the Clerk of the Court.

The unfairness of *Jewett*'s holding, as applied to Mrs. Irvine, is dramatically apparent, because she lived in Minnesota in the Eighth Circuit, where *Keinath* was not only settled but controlling law at the time of her Disclaimer. Moreover, she had a right to disclaim that existed before enactment of the gift tax statute. The Government had announced it would follow *Keinath* in the Eighth Circuit, and Mrs. Irvine quite justifiably relied on *Keinath* in making her Disclaimer. Jewett, by contrast, disclaimed before *Keinath* was decided and had no pre-existing right to disclaim.31/ Given these equitable factors and circumstances not present in Jewett's case, this Court should conclude that Mrs. Irvine's Disclaimer made shortly after Trust termination was made within a "reasonable time" as required by the 1986 Regulation.

2. **Alternatively, *Jewett* Should Be Reconsidered and Overruled Because It Was Based Upon Erroneous Information Concerning the History of the 1958 Regulation and the Commissioner's Interpretation of that Regulation.**

If the Court nevertheless believes that *Jewett* governs here, Respondents respectfully submit that the Court should reconsider and overrule the interpretation of the 1958 Regulation adopted by the majority in *Jewett*. The Government informed the Court in oral argument that the Commissioner had "absolutely not" ever taken a contrary position regarding the meaning of the

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31/ The fact that Jewett's interest was created after enactment of the Act was critical to the Court's conclusion that Jewett had no "right" to make a disclaimer without gift tax consequences. 455 U.S. at 317; *see also* 8th C. S. App. 53-54 (excerpt from Government's brief filed in *Jewett*, arguing that taxation was proper because "Regulation did not deprive petitioner of any pre-existing right").

ambiguous 1958 Regulation. And the *Jewett* majority's belief that the Commissioner had consistently interpreted both the Code and the Regulation regarding disclaimers was integral to its decision to uphold the Government's interpretation of the ambiguous 1958 Regulation. In fact, documents that were not before the Court in *Jewett* establish that the Commissioner had not been consistent in his interpretations of either the Code or the Regulation.

As the *Jewett* majority recognized, the Commissioner's interpretation of the Code or of a regulation is entitled to respect, but only if it has been consistent. 455 U.S. at 318; *see also Rowan Cos. v. United States*, 452 U.S. 247, 258-63 (1981) (holding Treasury Department regulation invalid in part due to Department's inconsistent interpretations in published and private rulings since statute's enactment in 1935). The Court in *Jewett* did not have before it the following IRS policy statements which establish that the *Commissioner* had applied the *Brown* rule for years before issuance of the 1958 Regulation:

1. GCM 24626 (1945), *reprinted at* RA 1, approving a letter ruling holding that a renunciation of a life interest in a trust will not constitute a taxable gift.

2. GCM 27626 (Jan. 15, 1953), *reprinted at* JA 39, describing the "right which the beneficiary holds . . . to accept . . . or the equal right to reject" and stating, based on *Brown*, that "[t]he provisions of the Code do not contemplate the taxing of testamentary gifts by renunciation."

These policy statements are consistent with the early Treasury Regulations interpreting the Gift Tax Act and

the 1939 Code, also not before the Court, which nowhere mentioned disclaimers or included any examples suggesting that a refusal to accept a gift was a "transfer of property." *See supra* at 23 n.19. The Court also did not have before it an internal Treasury Department memorandum prepared shortly before the publication of the federal gift tax regulations in proposed form in 1957, explaining that only six regulations represented "major changes" from existing regulations, all the "direct result of the enactment of the 1954 Code." A proposed regulation regarding disclaimers was not among them.[32/]

These documents strongly, if not conclusively, show that the 1958 Regulation merely was intended to continue the Treasury Department's historic position regarding disclaimers, following the *Brown* rule.[33/] This is reinforced by the fact that the Treasury Department determined to apply the 1958 Regulation retroactively to 1955 rather than prospectively. *See* Treas. Reg. § 25.0-1(a). The Treasury Department's practice during that era was to apply only prospectively any regulation or ruling changing an earlier position, if the change was detrimental to taxpayers. *See generally* Mitchell Rogovin,

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32/ The memorandum, obtained by Respondents in discovery and reprinted at RA 5, transmitted the proposed gift tax regulations to the Secretary of the Treasury for approval of publication in the Federal Register. In interpreting the 1958 Regulation, the *Jewett* majority considered a similar Treasury Department memorandum generated at the time of publication of the final gift tax regulations. 455 U.S. at 313-14.

33/ Jewett had argued in his reply brief that the 1958 Regulation was intended to "codify" the "existing common law of disclaimer as expounded" in *Brown* and *Hardenbergh*. *Jewett* Reply Brief of Petitioner 6. But what Jewett and the Court failed to appreciate is that the *Brown* rule represented both the established judicial interpretation of the gift tax statute and the established Treasury Department position.

The Four R's: Regulations, Rulings, Reliance and Retroactivity, 43 Taxes 756, 762-63, 769 (1965) (author was then IRS Chief Counsel); *see also* John S. Nolan & Victor Thuronyi, *Retroactive Application of Changes in IRS or Treasury Department Position*, 61 Taxes 777 (1983) (1983) (practice followed today as well).

The Court also was misinformed by the Government during oral argument that the Commissioner had "absolutely not" interpreted the 1958 Regulation in a manner contrary to its interpretation in *Jewett*. *See* 8th C. S. App. 6, 58–61. The 1966 letter ruling discussed above, *see supra* at 34-35, took a contrary position, holding that the "transfer" did not occur upon the creation of an income interest in a trust, but after a contingency event occurring 33 years later. This was the only ruling issued by the Commissioner up to that time interpreting the application of the 1958 Regulation to an interest in a trust, at least the only ruling that remains available. The 1966 letter ruling further reinforces the conclusion that the 1958 Regulation was intended to continue the Commissioner's historic adherence to the *Brown* rule, and suggests that the Government's position taken beginning with its litigation of *Keinath* was a new position, developed for litigation, well after the fact. In light of all of the relevant authorities, the Court should reconsider and overrule the *Jewett* majority's interpretation of the 1958 Regulation.

CONCLUSION

For the foregoing reasons, the judgment of the *en banc* Court of Appeals for the Eighth Circuit should be affirmed.

Dated: September 2, 1993 Respectfully submitted,

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APPENDIX

Internal Revenue Service General Counsel's Memorandum 24626 (1945)

GC:I:GHS
A-396092

In re:

DEPUTY COMMISSIONER BLISS:

Reference is made to your memorandum of December 8, 1944, (MT-ST-RR) transmitting for review of proposed ruling with respect to whether the renunciation by * * * of her interests under the will of her deceased husband would constitute a gift under the Federal gift tax statute.

It is the view of this office that the renunciation by * * * of her interests under the will, in the absence of other material circumstances or any affirmative acts on the part of the widow [illegible] the subsequent disposition of the property involved [illegible] to establish a donative intent, would not constitute a gift. This office, therefore, is in accord with the conclusions reached in the proposed ruling letter, but it is suggested that for the purpose of qualifying the ruling as hereinabove indicated the last paragraph of the letter be rewritten to read as follows:

> Under the circumstances stated in your letters, and in the absence of other material circumstances as a part of the proposed action, if the bequest of the life estate is irrevocably renounced by * * * during the administration of her husband's estate and prior to the receipt by her of any income from the trust property, such renunciation will not constitute a gift under the provisions of the Federal gift tax act.

[illegible]
Chief Counsel
Bureau of Internal Revenue

[Document stamped "Obsolete."]

[Document stamped "This document is not to be relied upon or otherwise cited as precedent by taxpayers."]

A-396092

WT-ET-RR
* * *

Dear * * *:

Reference is made to your letters of October 27 and November 8, 1944, inquiring whether the renunciation by * * * of her interest under the last will and testament of her deceased husband would constitute a gift under the Federal gift tax statute.

* * *, the husband of * * *, died testate during the year 1944 as a resident of * * *, Texas. The last will and testament was entered for probate on July 1, 1944. Under the will and codicil the decedent's entire estate, consisting of separate property and his interest in the community estate of himself and his wife was left in trust with The * * *, as trustee, providing for the payment of the entire income to the wife, * * *so long as she may live, and for a division upon her death of the corpus equally among the daughters of the decedent and his wife, share and share alike.

It is evident that * * * is entitled, under the provisions of the will and codicil, to the income from the trust for life. You state that * * * has accepted no benefit under her husband's will, has taken no steps which would bind her to an acceptance of the will, and contemplates renouncing the bequest to her contained in the will.

If the bequest of the life estate is irrevocably renounced by * * * during the administration of her husband's estate and prior to the receipt by her of any income from the

trust property, such renunciation will not constitute a gift under the provisions of the Federal gift tax law.

Very truly yours,

[illegible] Bliss
Deputy Commissioner

[Document stamped "Obsolete."]

[Document stamped "This document is not to be relied upon or otherwise cited as precedent by taxpayers."]

Treasury Department Memorandum
Notice of Proposed Rulemaking, Regulations Relating to Gift Tax

U.S. TREASURY DEPARTMENT
WASHINGTON 25

OFFICE OF
COMMISSIONER OF INTERNAL REVENUE
T:P:A
R-346-

MEMORANDUM FOR: Honorable George M. Humphrey
Secretary of the Treasury

SUBJECT: Notice of proposed rule making– Regulations under provisions of the Internal Revenue Code of 1954 relating to the gift tax.

There is transmitted for your approval for publication in the Federal Register a notice of proposed rule making with respect to the Gift Tax Regulations (26 CFR Part 25) under chapter 12 of subtitle B and under certain sections of subtitle F of the Internal Revenue Code of 1954. The Gift Tax Regulations are applicable to gifts made during the calendar year 1955 and subsequent years.

The 1954 Code made comparatively few changes in the gift tax area. However, it presented an opportunity for a general revision of existing regulations which are of long standing and which are subject to clarification and elaboration in various areas.

Substantively, the proposed regulations are similar to existing regulations. The major changes are the direct

result of the enactment of the 1954 Code and may be summarized as follows:

(1)The regulations relating to the disallowance of the $3,000 exclusion with respect to gifts of future interests in property, proposed under section 2503, reflect two important changes made in the 1954 Code. First, where there has been a transfer to any person of a present interest in property (such as income for life), the possibility that the interest may be diminished by the exercise of a power will not cause disallowance of the exclusion if no part of the interest will at any time pass to any other person. Secondly, property transferred for the benefit of a minor qualifies as a present interest if specified conditions set forth in the Code are satisfied.

(2)The regulations proposed under section 2504 reflect the change made by section 2504(c) of the 1954 Code, which places a limitation on the rights of both the Government and taxpayers to revalue gifts made in prior calendar years for purposes of computing the total amount of gifts made in preceding calendar years. The 1939 Code did not contain any provision comparable to that set forth in section 2504(c).

(3)Sections 2501 and 2511 provide new rules for the taxation of gifts made by nonresident aliens. Under section 2501 the tax does not apply to gifts of intangible property made by a nonresident alien who was not engaged in business in the United States. Under section 2511 the tax applies, in the case of a nonresident alien, only to a gift of property situated within the United States, and shares of stock constitute property within the United States only if issued by a domestic corporation. Since any regulations relating to nonresident aliens under one

of these sections would be incomplete and not easily understood without reference to the regulations under the other section, the regulations relating specifically to gifts made by nonresident aliens have been combined and appear under section 2511.

(4)New regulations have been prescribed under section 2515 of the 1954 Code, which provides that, under certain circumstances, the transfer of property by one person to himself and his spouse as tenants by the entirety does not constitute a gift at the time of the creation of the tenancy, but that a gift may be made at the time the tenancy is terminated. However, a spouse may elect to treat the creation of a tenancy by the entirety as a gift, in which case the amount of the gift is determined under the general provisions of law relating to the making of gifts (generally the same as under the 1939 Code). There was no section in the 1939 Code which corresponds to section 2515. The regulations under the 1939 Code relating to the making of gifts at both the time of creation of a tenancy and at the time of its termination were limited in extent. The new regulations under section 2515 contain not only the regulations relating to the new provisions of law, but also the appropriate rules which were, in practice, applied under the 1939 Code, since upon termination of a tenancy in many cases it will be necessary to determine a portion of the value of the gift under section 2515 and the remaining portion of the gift under the general provisions of the law.

(5)New regulations have been prescribed under section 2516 of the 1954 Code which excludes from gift tax transfers made under certain property settlements. There was no corresponding section in the 1939 Code.

(6)The regulations under section 2523, relating to the marital deductions, have been expanded as a result of liberalizing changes made in the 1954 Code. A deduction is now allowed where a surviving spouse is given a legal life estate with a power of appointment over the remainder. In addition a deduction is allowed where a surviving spouse is given the right to income for life from only a portion of an interest in property plus a power of appointment over that portion of the interest.

Minor substantive changes have been made, to reflect changes made by the 1954 Code and to clarify existing regulations to facilitate administration. For the most part, the clarifying changes are based on recent court decisions and revenue rulings.

With respect to nonsubstantive matters, the proposed regulations reflect a more extensive change. The regulations have been arranged in accordance with the Code section to which they apply, in a manner similar to that followed in recent years in the issuance of income tax regulations. Many headings and examples have been added where considered helpful. Administrative regulations designed to assist donors in filing their returns and in paying the taxes shown thereon have been

incorporated in the Gift Tax Regulations.

Commissioner

Attachment

[Various initals noted]
12-14-56